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No. 94-112

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GIUDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Petitioners,

– against –

DR. LEONARD JEFFRIES, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

In their Petition for Certiorari, Petitioners presented a neatly crafted fact pattern that was contrary to the facts actually established in this case and accepted by the jury

that heard and considered all of the evidence presented at trial. As a consequence, the Petitioners have not properly or honestly framed the issues they now present to this Court. Petitioners have attempted to create a scenario designed to align this case with those cases in which this Court has upheld speech related termination of a public employee and thereby create an illusion of inconsistency in the Court of Appeals' decision for which they seek review. Petitioners' analysis of this case improperly concludes that the decision of the Court of Appeals adversely impacts on the consistency of Circuit Court interpretations of First Amendment protection of public employees. The Petitioners' analysis and conclusions are incorrect and represent an attempt to elevate to a level necessary to qualify this case for review, a matter that is of personal political concern to the individual Petitioners, but which does not present any questions that have not already been answered in the same way by this Court or by other Circuits.

As discussed herein, Certiorari should be denied in this case because:

1. The Second Circuit Court of Appeals' decision is not in conflict with any decision of this Court or of any other Court of Appeals; and,

2. This case does not present special or important reasons for the granting of Certiorari.

STATEMENT OF THE CASE

Respondent respectfully refers the Court to the factual statement presented by the Second Circuit in its opinion (Petition at 4a to 13a).

Petitioners' statement of the case is an attempt to force upon this Court a set of facts and circumstances not proven at trial, not accepted by the District Court in its consideration of the Petitioners' Post-Trial motions, and rejected by the Court of Appeals in reaching its decision.

Petitioners' statement of the case attempts to frame the issues as involving a challenge to the "authority of university administrator's to decide who may speak for the university." This was not a question below and it is not a proper or appropriate question for the Petitioners to present for consideration now. Petitioners further muddy the waters of review by incorrectly defining for this Court the Respondent's position, authority, and role as a Department Chair and by mis-stating the true purpose and nature of a public university.

This is a Petition for a Writ of Certiorari, intended to seek review of a Decision of the Second Circuit Court of Appeals. This matter is now before this Court on a Petition for review after having endured a process beginning with a trial in the district court. In any such process, a common thread of fact and reality must run throughout. That thread is broken when Petitioners seek now to recast the facts and introduce fictionalized reality in support of their petition.

Notwithstanding any statements by Petitioners to the contrary, the relevant and essential facts in this case are:

1. That the speech in question (the "Speech") was not, was never intended to be, and was never considered as spoken in the course of or related to the Respondent's employment with the Petitioners. (Although Respondent is actually an employee of City College of New York ("CCNY"), CCNY is not named as a party in this case, the word "Petitioners" will hereafter be used to describe

the named parties and/or the entity that actually employs the Respondent).

2. That the Speech was not given pursuant to or in relation to any function of the City University of New York ("CUNY") or CCNY.

3. That the Respondent spoke as a private citizen at an event entirely unrelated to the Petitioners or his employment with the Petitioners.

4. That at the time of his Speech, the Respondent functioned as the Chairman of the Black Studies Department at CCNY. As Chairman, the Respondent functioned in a University system with 199,554 students, 9,100 faculty members, 596 managerial administrators, and 595 chairpersons of the various departments within the twenty-one (21) colleges comprising the City University system.[1],[2]

As Chairman, the nature and extent of Respondent's leadership role was limited to the leadership of his department and advocacy of his department's interests. The applicable provisions of the CUNY By-Laws governing the role and function of a Department Chair, provide that the Chair of a department merely participate "in

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[1]Source: Peterson's College Guide.

[2]It should be noted, that had it not been for the fact that Respondent was a pioneer in the field of Black Studies, (he formed one of the nations first Black Studies Departments at San Jose State University and built the Department at CCNY); Respondent's involvement as Chairman of the Association for the Study of Classical African Civilizations; his leadership in the field of African centered and multicultural education; and, his role as a consultant to the State of New York on curriculum reform, he would labor as Chairman in relative but noble obscurity, just as the great majority of CUNY's other 594 Department heads do.

the formation, development and interpretation of college-wide interest and policy" (Article IX, Section 9.1(c), Petition at 139a). This provision does not bestow upon a Department Chair any college-wide power or authority, but simply requires that a Chair be able to bring the interests of his department to the table when college-wide interest and policy is discussed. In line with this requirement, a Department Chair is expected to manage his or her department, not the College or the University. The language of the CUNY By-Laws clearly and simply describes Respondent's role as that of leader, spokesman and advocate for his department, not as leader, spokesman or advocate for the University or the College. (Article IX, Section 9.3, Petition at 142a to 143a). Moreover, and with respect to the managerial and organizational structure at CUNY and CCNY, Department Chairs are excluded from positions of University-wide or College-wide authority. This interpretation was confirmed by the Petitioners' Vice Chancellor for Legal Affairs, Robert Diaz, when he stated before a New York State Senate Committee that, Department Chairs "perform a managerial function, but they are not managerial". (SA5)[3]

Petitioners argue that the Speech threatened the effective and efficient fulfillment of their responsibilities to the public. Yet, in their effort to qualify for review, the Petitioners fail to identify the public services they perform through their employees, that were hampered by the Speech and how the Speech hampered their ability to deliver those services. The Petitioners offer only references to "missions", one described as an effort to

[3] "SA" denotes the Supplemental Appendix submitted to the Court of Appeals.

enhance diversity and pluralism (Petition at page 8) and another described as providing access to an "excellent education to all of the people of New York". (Petition at page 8). These missions are fine, laudable and necessary goals for a public institution, but they fail to speak to the operations, functions or responsibilities of the Petitioners and, therefore, fail to identify how the effective and efficient operation of the University, the College or the Black Studies Department was hampered or threatened by the Speech. Petitioners mislead this Court when they define their purpose and function in vague and idealistic terms rather than to present concrete definitions of their operations. Nevertheless, we can understand the Petitioners' true function by examining the definition of "*education*" as found in The Random House Dictionary of the English Language, College Edition. The Random House Dictionary defines *education* as *"the act or process of imparting or acquiring general knowledge and of developing the powers of reasoning and judgment"*. The general function of any academic institution is, therefore, to promote, not to limit, the free exchange of ideas. An institution of higher learning is in fact supposed to be our nation's busiest and most diverse market place for the exchange of ideas, all ideas, including those ideas not popular with or palatable to vocal or powerful segments of our society. The Petitioners' responsibilities in furtherance of this function include management of personnel, student enrollment, public money and property. Although they attempt here, as they did during the trial in the District Court, to link the Speech to some threatened or actual harm to this aspect of their public function and purpose, they are unable to identify one scintilla of credible evidence to support their allegations of harm. The Petitioners claim

an impact on financial contributions to the University but when given the opportunity to do so they failed to present any evidence of lost income as a result of the Speech. The Petitioners claim an impact on the Respondent's colleagues and their willingness or ability to work with the Respondent or within the University as a result of the Speech. No evidence was presented at the trial, which took place almost two years after the Speech, of any refusal or failure of any faculty member or administrator to work with the Respondent or within the University, as a result of the Speech. Petitioners argue that the Speech would harm student enrollment. In fact, enrollment has increased both in the Black Studies Department and in the College in the years following the Speech. University-wide, student enrollment has gone from 199,554 during the 1991-1992 academic year (the year the Speech became a public issue) to 202,531 during the 1992-1993 academic year. Student enrollment for the 1993-1994 academic year, the year following the Respondent's highly publicized and successful litigation against the Petitioners in the District Court, and his subsequent reinstatement as Chair of his Department, jumped to 208,000.[4] The increases in 92-93 and in 93-94 were greater than the increases in the year preceding the Speech, with the increase in the 93-94 academic year being the second largest yearly increase in a decade. The Petitioners suffered no real harm as a result of the Respondent's Speech. What did happen was that there was an increase in the level and intensity of research and debate following the Speech. This, one would think, would be welcomed in an academic institution.

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[4]Source: City University Of New York, as reported by the New York Times, January 9, 1994.

Petitioners lace their Petition with references to allegations regarding the Respondent's actions or performance as Chair before and after the Speech. As both the District Court and the Court of Appeals observed, not a "scintilla of evidence" was presented to show that any of these alleged events impacted or influenced the Petitioner's decision to deny the Respondent his duly elected three year term as Chair of the Black Studies Department. The evidence at trial and, therefore, the foundation of any appellate review, showed conclusively that there was no consideration by the Petitioners at either their October 28, 1991 Board meeting or their March 23, 1992 Board meeting, of any incident in which the Respondent is alleged to have been involved and which would have justified their action against him. If any of the incidents in which the Respondent was alleged to have been involved were of real concern to the Petitioners, there were established procedures through which the Petitioners could have acted against the Respondent, if the alleged incidents, individually or taken together, rose to the level necessary to justify Respondent's removal or denial of his term as Chair of his Department. No such procedures were ever employed. The only matter considered by the Petitioners in their decision to deny Respondent his term as Chair, was his Speech.

Petitioners mis-state the case in their presentation to the Court. The true statement of the case is a simple one. The Petitioners denied the Respondent his duly elected three year term as Chairman of the Black Studies Department because the Petitioners disagreed with the content of the Respondent's Speech on a matter of public concern. There are no frills, bells or whistles here, and it is because of the sheer simplicity of the case that Certiorari must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners operate and manage a public institution formed and operated to provide a means through which members of the public can obtain, at reasonable cost, a quality education.

The function of the Petitioners is to manage this institution and its delivery of educational services, not to control or limit the protected ideas, thoughts and speech of individuals, even individuals who are their employees. New York Education Law Section 6201 et. seq. (McKinney 1985)

To grant the petition would confuse the already established principles upon which existing case law is based with respect to the application of First Amendment protection to public employees.

I.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

A.

The Petitioners attempt to establish a conflict between the decision of the Second Circuit Court of Appeals and this Court and other Courts of Appeals by citing cases in which action against public employees as a consequence of their speech was upheld. In each of the cases cited and relied upon by the Petitioners, there is a consistent fact pattern that is clearly distinguishable from the facts in this case. In all of the cases relied upon by the Petitioners, the public employer acted when an employee engaged in speech related to, in the course of, or in some way directly affecting, his or her employment. In these

cases, including *Hall v. Ford,* 856 F.2d 255 (D.C. Circuit 1988); *Connick v. Meyers,* 461 U.S. 138 (1983); *McMullen v. Carson,* 754 F.2d 936 (11th Cir. 1985); *Mings v. Department of Justice,* 813 F.2d 384 (Fed. Cir. 1987); *Dartland v. Metropolitan Dade County,* 866 F.2d 1321 (11th Cir. 1989); *Benson v. Allphin,* 786 F.2d 268 (7th Cir.) *cert. denied,* 479 U.S. 848 (1986); and *Waters v. Churchill,* 114 S.Ct. 1878 (1994), the speech in question was either a direct criticism of the employer or a practice or policy of the employer, such speech having an impact on the effective and efficient operation of the employer or the confidence or morale of other employees, or, as in *McMullen,* speech creating a situation directly and negatively impacting the employer's ability to effectively perform the public service it was responsible for performing. In *McMullen,* an employee of the sheriff's department publicly announced his active involvement with the Ku Klux Klan, a group known to be violent and lawless. Such a public pronouncement was cleary likely to disrupt the ability of the employer to function effectively with that part of the public likely to be victimized by the Klan, and to hamper the ability of the employer to enforce the law when investigating or confronting the Klan's activities. The employee in *McMullen,* as a law enforcement employee, faced a more rigid standard than the one to be applied to Respondent.

In *Waters,* a nurse is alleged to have spoken ill of her employer, a public hospital, and its programs. *Waters* is heavily relied upon by the Petitioner, but it sheds no new light on the issues already decided by the Court of Appeals. *Waters* is consistent with its predecessors which permit action against public employees whose speech hampers or negatively impacts the ability of a public employer to function or to maintain the confidence of its

other employees. *Waters*, however, does not relate to speech that does not involve or affect the function of the employer or the duties of the employee. What *Waters* does do is to confirm the principles established by *Connick* and more clearly define the requirements of *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Connick*, the Court established that the state, as employer, had the burden of justifying a particular discharge but that that burden varied depending upon the nature of the employee's expression. The Court was balancing the interest of the state against the interest of the employee and defining the weight of the employee's interest according to the nature of the speech in question and the real or perceived nature of the impact of the speech. The Court held that "Although such particularized balancing is difficult, the court must reach the most appropriate possible balance of the competing interests." *Connick*, 461 U.S. at 150. After balancing the interests of the parties in *Connick*, the Court upheld the employee's discharge because her speech involved direct criticism of the policies and practice of her employer to the extent that it was likely to disrupt the effective and efficient operation of the work place. The Petitioners place a great deal of faith in their interpretation and application of *Connick*, especially that aspect of *Connick* that supports the notion that a likelihood of disruption, resulting from an employee's speech, is sufficient to justify employer action against the employee. In supporting this notion, the *Connick* Court offered that it did not "see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action". *Id.* at 151-152. The Petitioners seize upon this language and use it to sup-

port their contention that a reasonable expectation of harm is sufficient to balance the equities fully in their favor. Even if expectation were sufficient here, it must be in good faith and it must have some reasonable connection to the time and method of its' application. In this case, the Petitioners investigated the impact of the Speech on the Respondent's ability to function as Chair of his department. The conclusion reached by the Petitioners as a result of that investigation was that Respondent was performing his duties adequately and that he continued to work, without handicap, with all elements of the University community. In particular, the Respondent continued to function as a member of the College's Personnel and Budget Committee, at which he successfully participated, along with other department chairs, in the formation of College-wide interests and policy. Whatever fears the Petitioners may have had immediately following the Speech were in reality dissipated over time, and certainly by the time of the March 23, 1992 Board meeting, at which the Respondent was denied the balance of his duly elected three year term as Chair. The Petitioners were on notice that there was no actual harm to the University, the College or the Black Studies Department as a result of the Speech, and that given the passage of time (eight months following the date of the Speech), it was not likely that there would be any disruption. The Petitioners were required to act in good faith with respect to the action they took against the Respondent. This they did not do, and as a consequence they failed to sustain their burden at trial. In reaching this conclusion, the District Court followed a principal later enunciated in *Waters,* that the "courts should look to the facts as the employer reasonably found them to be". *Waters,* 114 S.Ct. at 1889. This does

not require that the court, in the face of overwhelming evidence to the contrary, believe a set of facts advanced by the Petitioners that are simply not true. At the time the Petitioners took action against the Respondent, what they reasonably found to be the facts was not in any way supportive of a conclusion that the Respondent's Speech was disruptive, or that there still remained any reasonable basis for an expectation of disruption.

The Petitioners had an opportunity to act on any "reasonable fears" before they had information sufficient to conclude that the Speech did not affect the efficient operation of the University, the College or the Black Studies Department. This they did not do and as a consequence of that failure, they have waived and forfeited any opportunity to argue the innocence of reasonable expectation of harm.

Assuming arguendo that the Petitioners could effectively argue that they reacted reasonably and in good faith to a reasonable fear and concern that the Respondent's remarks would hamper the Petitioners' operation, such a conclusion would not end the Court's consideration of the matter, it would only begin the Court's consideration of the balancing test required by *Pickering*. Even where actual disruption is found, it is only a weight on the scales used by the Court to balance the interests of the parties. *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979). Such a balancing process would pit the interests of the Respondent in speaking as a private citizen on a matter of great public concern, against the interest of the Petitioners in maintaining an effective and efficient work place. To reach a reasonable and just conclusion, the District Court did consider and weigh the Petitioners' expectations against the First Amendment interests of the Respondent, and found the Respondent's

interests to be of greater weight. Moreover, in accordance with this Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987), the District Court examined the "extent of authority and public accountability" the Respondent's role as employee entailed. What the District Court found, based on the undisputable evidence produced at trial, was that the Respondent's role as Chair was, as Vice-Chancellor Diaz so properly defined it, not mangerial. In addition, an examination of the By-Laws of CUNY, even the provision relied upon by the Petitioners, defines a role and authority limited to the leadership and representation of the Department. The Petitioners have quoted Section 9.1(c) of the By-Laws, but in a disjointed and deceptive way. The full text presented in its proper context is more revealing, and not likely to give this Court the impression that the role of university spokesman or policy maker is a part of the Respondent's duties. 9.1(c) states in pertinent part:

> The President shall base his/her recommendation on the capacity of the individual selected to act effectively as the *departmental* administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy.[5] (emphasis added).

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[5]The only vehicle through which a Department Chair participates in the formation of college-wide interests and policy is the College Personnel and Budget Committee, the function of which is to deal with issues affecting tenure, staffing and budget concerns affecting the college and the various departments. The process is not a public one.

B.

Petitioners raise a question as to the degree to which the Respondent's Speech constituted expression on a matter of public concern. While they concede that parts of the Speech dealt with matters of public concern, they argue that other parts, apparently any part in which the Respondent mentioned the ethnic background of critics or opponents of the type of curriculum reform he advocated, were not protected. The issues raised by the Respondent in his Speech, including the ethnicity of those who constituted a major and organized element of the opposition to the kind of curriculum reform desired by African Americans, were matters of public concern. Certainly conflict between ethnic groups in America on matters of importance to large segments of our society are important public issues. To some, the Respondent's Speech represented verbal tumult, promoted discord and contained offensive utterances. To this Court, such elements of speech must be tolerated as a necessary side effect of the process of open debate. *Waters*, 114 S.Ct. at 1886. That process has in fact spurred a great deal of thought and interaction across this country on the topics identified in the Speech. From the issue of multicultural curriculum to the role of Jews in the Trans-Atlantic slave trade, the issues addressed by the Speech have become a part of the American landscape of debate. At the time of the Speech there were, in national periodicals, 3,780 articles on the topics covered in the Speech. Since the Speech, the number of articles has risen to 10,659.[6] Certainly, there has been, and there is, a serious public interest in the topics covered in the Speech, including the unpleasant subject of the conflict of ideas

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[6]Source: WestLaw Data Base, Periodicals.

and goals between African Americans and Jews. The Petitioners would have this Court stifle the discussion and debate which the Speech was an integral part of. This Court has already determined that such speech is protected.

C.

On the question of qualified immunity, the Petitioners have again failed to properly and honestly present the facts to this Court, and they compound that failure by misinterpreting the applicable case law. The relevant facts are that the Petitioners were advised by their counsel, Vice Chancellor Diaz that they could not punish the Respondent because of his Speech (Petition at 7a-8a). In so advising Petitioners, Mr. Diaz informed them of and reviewed with them, the decision of the District Court in the matter of *Levin v. Harleston*, 770 F. Supp. 875 (S.D.N.Y. 1991), a case involving a white CCNY professor who made racist and bigoted remarks about blacks. In *Levin*, the District Court ruled that his speech, bigoted though it was, was protected. Mr. Diaz advised the Petitioners that the *Levin* decision was controlling and that they should act accordingly when considering reaction to the Respondent's speech. In response to this advice, the Petitioners designed a scenario intended to mask the true reason for the action they would take against the Respondent. At trial, of course, the mask of deception was removed and the truth was uncovered by the trier of fact. That truth was that the reasons advanced at trial by the Petitioners to justify their action against the Respondent were a pretext, intended to protect them from liability by hiding the true motive for their actions. Once that pretext was exposed and the nature and extent of their knowledge of the clearly established

statutory or constitutional rights they were violating became apparent, the District Court was correct in denying the Petitioners qualified immunity.

There is no special consideration in a qualified immunity case just because it is considered in the context of a *Pickering* claim. The applicalbe law is the same, regardless of the underlying claim. As in *Benson v. Allphin,* 786 F.2d 268 (7th Cir. 1986), where the court engaged in a balancing test to determine whether the employer's "interest in the proper functioning of his office outweighed Benson's First Amendment interests. . ." *Benson* at 271-272, the District Court, separate from the balancing of the interests, considered the question of qualified immunity in the context of the well established case law. The standard is the same in all of the cases cited, the nature and extent of the defendant's knowledge of the clearly established statutory or constitutional rights of which reasonable persons should have known. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092 (1986); *Matherne v. Wilson,* 851 F.2d 7752 (5th Cir. 1988).

II.
THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF CERTIORARI.

Certiorari is granted "only when there are special and important reasons therefore". Rule 10.1. This case does not present special or important reasons that will justify this Court considering issues that have already been decided in conformance with the governing law.

The Petitioners litigated and lost the *Levin* case but chose not to appeal the Appeal Court's decision upholding the District Court judgment. *Levin v. Harleston,* 770

F. Supp. 895 (S.D.N.Y. 1991) aff'd in part and vacated in part, 966 F.2d 85 (2d Cir. 1992). In this case the Petitioners have different political considerations and feel compelled to appeal. This Court would become the vehicle for the Petitioners' personal political agendas if it were to accept this case for review. As this case is strictly a First Amendment case from the academic arena, with no special qualities except for its political implications, there are no special or important reasons warranting the granting of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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